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17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA
 19 SAN FRANCISCO DIVISION

20 MIKE M. MADANI, *et al.*,

CASE NO. CV-07 04296 MJJ

21 Plaintiffs,

[PROPOSED] ORDER RE DEFENDANTS'
 MOTION TO DISMISS

22 vs.

Date: December 18, 2007
 Time: 9:30 a.m.
 Dept.: Courtroom 11, 19th Floor
 Judge: Hon. Martin J. Jenkins

23 SHELL OIL COMPANY, *et al.*,

24 Defendants.

1 Defendants have moved to dismiss the complaint in this action pursuant to Rule
 2 12(b)(6) of the Federal Rules of Civil Procedure. The Court grants the motion for the reasons
 3 stated below.

4 **I. BACKGROUND**

5 Plaintiffs' complaint ("the *Madani* complaint") alleges that, during the period
 6 January 1998 through October 2001, defendants violated federal antitrust laws through the
 7 formation and operation of two joint ventures, Equilon and Motiva, which combined defendants'
 8 domestic gasoline refining and marketing operations. Plaintiffs allege a *rule of reason* violation
 9 of Section 1 of the Sherman Act, 15 U.S.C. § 1, and an unlawful acquisition that substantially
 10 lessened competition under Section 7 of the Clayton Act, 15 U.S.C. § 18.

11 The *Madani* complaint follows a prior unsuccessful action challenging certain
 12 aspects of the joint ventures. An understanding of that prior action is necessary for purposes of
 13 evaluating the sufficiency of the current complaint.

14 **A. Dagher**

15 On June 15, 1999, Shell-branded and Texaco-branded service station operators
 16 filed a putative nationwide class action against Texaco, Inc., Shell Oil Company, Saudi Refining,
 17 Inc., and related entities, in the United States District Court for the Central District of California.
 18 See Complaint in *Dagher v. Saudi Refining, Inc.*, U.S.D.C., C.D. Cal., Case No. CV-99-06114.¹

19 The two joint ventures at issue, Equilon and Motiva, effectively merged the entire
 20 United States gasoline refining and marketing operations of the defendants in the current case.
 21 *Dagher v. Saudi Refining, Inc.*, No. CV 99-6114 GHK, 2002 WL 34099815 at *5. The Motiva
 22 joint venture operated in the Eastern United States and involved Shell, Texaco and Saudi
 23 Refining. 2002 WL 34099815 at *5. The Equilon joint venture operated in the Western United
 24 States, and involved only Shell and Texaco (Saudi Refining did not have relevant operations in
 25 the Western United States). *Id.* at *6. The ventures were reviewed and approved under the

26
 27 ¹ The *Madani* complaint centrally references and relies upon *Dagher*. Accordingly, on this
 motion to dismiss, the Court takes judicial notice of the record in that litigation. See *United*
 28 *States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

1 antitrust laws by the Federal Trade Commission and the attorneys general of four states. *Texaco*
 2 *v. Dagher*, 547 U.S. 1, 4 (2006).

3 *Dagher* challenged each joint venture's policy of setting the wholesale price of its
 4 Shell brand of gasoline the same as the wholesale price of its Texaco brand of gasoline. *Dagher*
 5 claimed that this unification of gasoline prices under the two brands of gasoline that each venture
 6 sold violated the per se rule against price fixing under Section 1 of the Sherman Act. The claim
 7 in *Dagher* was dismissed by the district court with respect to Saudi Refining on May 21, 2002,
 8 and with respect to Shell and Texaco on August 13, 2002. *Dagher v. Saudi Refining, Inc.*, No.
 9 CV 99-6114 GHK, 2002 WL 34099816 (C.D. Cal. May 21, 2002); 2002 WL 34099815 (C.D.
 10 Cal. Aug. 13, 2002). The district court found that the ventures were legitimate and that it was not
 11 per se illegal price fixing for each venture to set the wholesale price of products that it
 12 manufactured as it saw fit. 2002 WL 34099815 at *7. On February 28, 2006, the Supreme Court
 13 unanimously affirmed, likewise finding that “[a]s a single entity, a joint venture, like any other
 14 firm, must have the discretion to determine the prices of the products that it sells, including the
 15 discretion to sell a product under two different brands at a single, unified price.” 547 U.S. at 8.²

16 The named plaintiffs in *Dagher* included Mike Madani, the lead plaintiff here.³
 17 Lead counsel in *Dagher* were the same as lead counsel here, Joseph A. Alioto of the Alioto law
 18 firm, Dan Shulman of the Gray, Plant, Mooty law firm, Tom Bleau of the Bleau, Fox law firm,
 19 and John H. Boone.

20 In *Dagher*, the plaintiffs and their counsel limited themselves to asserting a claim
 21 of per se illegal price fixing and waived any rule of reason challenge to any aspect of the joint
 22 ventures. The following exchange took place in the district court at the December 6, 1999
 23 hearing on defendants' motion to dismiss the first amended complaint:

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25 ² The May 21, 2002 ruling in favor of Saudi Refining found that plaintiffs lacked standing with
 26 respect to sales of gasoline by Motiva, because plaintiffs bought their gasoline only from Equilon.
 2002 WL 34099816, at *7. That ruling was affirmed by the Ninth Circuit and was not appealed.
Dagher v. Saudi Refining, Inc., 369 F.3d 1108, 1115-16 (9th Cir. 2004). Thus, the Supreme
 27 Court focused exclusively on Equilon.

28 ³ Mr. Madani was ultimately dismissed from the litigation by stipulation on November 20, 2000.

1 MR. ALIOTO: I want to proceed, Your Honor, but please, Your
 2 Honor, we wish to proceed on the basis that it is either a per se or
 3 quick look violation; that it is not the customary Rule of Reason
 4 type violation; that the issues of market power and impact upon the
 5 market are not an issue.

6 THE COURT: All right. So you are, in essence, waiving any
 7 future reliance upon the Rule of Reason.

8 MR. ALIOTO: Correct, Your Honor.

9 Transcript of Record at 14:22-15:6. When the district court entered summary judgment in
 10 defendants' favor, the district court likewise noted that "Plaintiffs have eschewed an exhaustive
 11 rule of reason analysis." 2002 WL 34099815, at *12. In the Ninth Circuit, plaintiffs again
 12 expressly "disclaimed any reliance on the traditional 'rule of reason' test, instead resting their
 13 entire claim on either the per se rule or a 'quick look' theory of liability." 369 F.3d at 1113. The
 14 same was true in the Supreme Court. *See* 547 U.S. at 4.

15 B. *Madani*

16 The current complaint was filed on August 21, 2007, more than five years after the
 17 district court entered summary judgment in *Dagher*. Like *Dagher*, the case is styled as a putative
 18 class action on behalf of a nationwide class of Shell-branded and Texaco-branded service station
 19 operators, not as an individual action. *Madani*'s lead named plaintiff and putative class
 20 representative is one of the *Dagher* plaintiffs, Mike Madani. Plaintiffs' lead counsel in *Madani*
 21 are identical to the lead plaintiffs' counsel in *Dagher*.

22 While there is an overlap in the named plaintiffs and proposed class
 23 representatives and plaintiffs' lead counsel are the same, the claims asserted in *Madani* are
 24 different from the claim asserted in *Dagher*. *Madani* alleges only rule of reason violations of the
 25 antitrust laws—a rule of reason violation of Section 1 of the Sherman Act and a violation of
 26 Section 7 of the Clayton Act. Whereas a per se Sherman Act claim requires proof only of the
 27 allegedly unlawful agreement (there, the decision to price the Texaco and Shell brands of gasoline

1 in a unified manner) as well as resulting damage, a Sherman Act rule of reason claim requires
 2 proof of actual anticompetitive effects in a relevant geographic and product market, as well as
 3 consideration of any pro-competitive effects. *See American Ad Mgmt., Inc. v. GTE Corp.* 92
 4 F.3d 781, 789 (9th Cir. 1996); *Kaplan v. Burroughs*, 611 F.2d 286, 291 (9th Cir. 1979). With
 5 regard to the Clayton Act Section 7 claim, there is no such thing as a per se violation of Section 7,
 6 and no Section 7 claim was included in *Dagher*. Any Section 7 challenge to a joint venture must
 7 show that the venture unreasonably decreased competition in the relevant market.

8 **II. LEGAL STANDARD**

9 A complaint should be dismissed where its legal insufficiency is apparent on its
 10 face, or in conjunction with materials of which the Court may take judicial notice. *See Jablon v.*
 11 *Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980); *Morales v. City of Los Angeles*, 214 F.3d
 12 1151, 1153 (9th Cir. 2000); *accord Torrance Redevelopment Agency v. Solvent Coating Co.*, 763
 13 F. Supp. 1060, 1066 (C.D. Cal. 1991).

14 **III. ANALYSIS**

15 A. **The Complaint Is Time Barred**

16 The statute of limitations applicable to plaintiffs' claims is four years under
 17 Section 4B of the Clayton Act, which applies to any claims under the federal antitrust laws. 15
 18 U.S.C. § 15b. Here, the complaint alleges a class period from January 1998 through October
 19 2001, the period during which the joint ventures between Shell and Texaco are alleged to have
 20 been in existence. The complaint was filed more than four years after October 2001. Because the
 21 time-bar is not merely a defect in pleading and could not be cured, the Court will dismiss the
 22 complaint with prejudice. *See Eminence Capital LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th
 23 Cir. 2003).

24 The Court finds that the class action tolling doctrine does not save the complaint,
 25 for a number of independent reasons.

26 First, the doctrine generally tolls the statutory period only for later-filed *individual*
 27 actions, not for later-filed class actions. *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir.
 28 1987); *accord Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Basch v. Ground Round, Inc.*,

1 139 F.3d 6, 10-11 (1st Cir. 1998); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994);
 2 *Andrews v. Orr*, 851 F.2d 146, 149-50 (6th Cir. 1988).

3 While the Ninth Circuit made a limited exception in *Catholic Social Services Inc.*
 4 *v. INS*, 232 F.3d 1139 (9th Cir. 2000) (“CSS”), that exception is inapplicable here. The court in
 5 CSS expressly cited to *Robbin* as controlling law, *id.* at 1147, but held that the statute of
 6 limitations should be tolled on the specific facts presented, where “[t]he substantive claims
 7 asserted in” the subsequent later action were “within the scope of those asserted in the earlier
 8 action, and the dismissal of that action did not result from an adverse decision on the merits of
 9 any of those claims.” *Id.* at 1149. Unlike *CSS*, the claims in *Madani* go beyond that asserted in
 10 *Dagher* and the claim in *Dagher* was fully litigated to a final judgment on the merits after
 11 development of a full record. There also is no intervening change in law here that affects who has
 12 standing to raise these claims such as was present in *CSS*.

13 Second, class action tolling is unavailable for “different or peripheral claims” not
 14 asserted in the initial class action. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354
 15 (1983) (Powell, J., concurring). “[W]hen a plaintiff invokes *American Pipe* in support of a
 16 separate lawsuit, the district court should take care to ensure that the suit raises claims that
 17 concern the same evidence, memories, and witnesses as the subject matter of the original class
 18 suit, so that the defendant will not be prejudiced.” *Id.* at 355. The significant differences between
 19 a per se claim (as asserted in *Dagher*) and rule of reason claims (as asserted here and expressly
 20 waived in *Dagher*) are well-recognized. For example, a per se claim requires no “elaborate
 21 inquiry as to the precise harm . . . caused or the business excuse for [the restraint.]” *Continental*
 22 *T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977). By contrast, a rule of reason claim
 23 involves a detailed and wide-ranging factual inquiry into the circumstances of the market and the
 24 effects of the agreement on the market: “[T]he court must ordinarily consider the facts peculiar to
 25 the business to which the restraint is applied; its condition before and after the restraint was
 26 imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint,
 27 the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought
 28 to be attained, are all relevant facts.” *Id.* at 50 n.15 (quoting *Bd. of Trade of Chicago v. United*

1 States, 246 U.S. 231, 238 (1918); *accord Los Angeles Memorial Coliseum Comm'n v. National*
 2 *Football League*, 726 F.2d 1381, 1387 (9th Cir. 1984) (rule of reason claim requires analysis of
 3 “all the circumstances of the case”); *Kaplan v. Burroughs*, 611 F.2d 286, 290 (9th Cir. 1979)
 4 (discussing difference between *per se* and rule-of-reason claims); *U.S. Football League v.*
 5 *National Football League*, 842 F.2d 1335, 1360 (2d Cir. 1988) (“Unlike a *per se* price-fixing
 6 case, a Rule-of-Reason case requires the fact finder to balance the procompetitive and
 7 anticompetitive *effects* of any restraint.”) (emphasis in original).

8 Third, even were class action tolling available, it would not save the *Madani*
 9 claims because it would toll the limitations period only until the date on which it was determined
 10 in the district court that *Dagher* would not proceed. *In re Copper Antitrust Litig.*, 436 F.3d 782,
 11 793 (7th Cir. 2006). Tolling is not available during appellate proceedings. *Id.*; *Stone Container*
 12 *Corp. v. United States*, 229 F.3d 1345, 1355-56 (Fed. Cir. 2000); *Armstrong v. Martin Marietta*
 13 *Corp.*, 138 F.3d 1374, 1391 (11th Cir. 1998). In some cases the issue has arisen in the context of
 14 whether the doctrine tolls the limitations period during appellate proceedings following the denial
 15 of class certification; here, by contrast with those cases, the district court entered judgment in
 16 *Dagher* prior to ruling on class certification. But the rule that tolling does not apply during
 17 appellate proceedings is not limited to appellate proceedings following the denial of class
 18 certification. *See Southwire Co. v. J.P. Morgan Chase & Co.*, 307 F. Supp. 2d 1046, 1064 (W.D.
 19 Wisc. 2004), *aff'd in relevant part*, *In re Copper Antitrust Litig.*, 436 F.3d 782, 793 (7th Cir.
 20 2006); *In re Enron Corp.*, 465 F. Supp. 2d 687, 703 (S.D. Tex. 2006); *In re Westinghouse*
 21 *Securities Litig.*, 982 F. Supp. 1031-1035 (W.D. Pa. 1997); *see also Hanford Nuclear Reservation*
 22 *Litig.*, 497 F.3d 1005, 1027 (9th Cir. 2007).

23 Finally, tolling is unavailable for the claims against Saudi Refining for the
 24 additional reason that the district court in *Dagher* found that the plaintiffs there lacked standing to
 25 assert their claim against Saudi Refining. 2002 WL 34099816, at *7. The Ninth Circuit affirmed
 26 that determination. *Dagher*, 369 F.3d at 1115. When a representative plaintiff in a putative
 27 class action lacks standing, that action does not toll the statute of limitations for later plaintiffs.
 28 *Palmer v. Stassinos*, 236 F.R.D. 460, 465-66 (N.D. Cal. 2006); *see also Walters v. Edgar*, 163

1 F.3d 430, 432 (7th Cir. 1998).

2 **B. The Complaint Fails To State An Antitrust Claim**

3 Although this Court concludes that the complaint is time-barred, the Court also
 4 notes that the complaint fails to state a claim for the additional reason that it fails to allege a
 5 relevant market in which there plausibly could have been anti-competitive effects of the conduct
 6 at issue.

7 An essential element of a rule of reason claim under Section 1 of the Sherman Act
 8 or Section 7 of the Clayton Act is the existence of a relevant market—that is an area of effective
 9 competition in which there is cross-elasticity of demand—in which the defendants' conduct has
 10 had an anticompetitive effect. *United States v. Phila. Nat'l Bank*, 374 U.S. at 362; *Tanaka v.*
 11 *University of Southern California*, 252 F.3d 1059, 1063 (9th Cir. 2001); *Big Bear Lodging Ass'n*
 12 *v. Snow Summit, Inc.*, 182 F.3d 1096, 1101 (9th Cir. 1999). The complaint does not sufficiently
 13 allege any relevant geographic market for gasoline in which the joint ventures could plausibly be
 14 said to have exercised market power.

15 First, the complaint's passing and contradictory allusions to certain geographies
 16 falls far short of minimum pleading requirements. The complaint variously refers to geographies
 17 including the entire United States (¶ 115), individual states (¶ 89), certain individual cities
 18 (¶¶ 108, 115), and "thousands of distinct pricing areas throughout the United States" (¶ 101).
 19 None of these references is buttressed with any hint as to the rationale by which one would
 20 determine the contours of the market or any factual allegation that would qualify it as a relevant
 21 market for antitrust purposes.

22 Second, the general market share numbers that the complaint affirmatively alleges
 23 make clear that anticompetitive effects are, at best for plaintiffs, implausible and speculative, for
 24 the geographies that the complaint references. For example, the joint ventures' overall market
 25 share in the United States is alleged to have been just 15 percent. ¶ 89. In 11 unnamed states the
 26 share was below 10 percent, in 24 additional but unnamed states (for a total of 35) the share was
 27 below 20 percent, in 12 additional but unnamed states (for a total of 47 states) the share was some
 28 unspecified amount below 30 percent, and in only 3 additional but still unnamed states was the

1 share above 30 percent. *Id.* Further, the complaint affirmatively alleges that, throughout the
2 United States, there were at least four significant competitors to the joint ventures, Exxon, Mobil,
3 Chevron and Amoco. *Id.* ¶ 82. These allegations are insufficient as a matter of law. *See*
4 generally *Valley Liquors, Inc. v. Renfield Imps., Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987) (“Market
5 share analyses in section 1 cases have led to conclusions that approximately 70%-75% of market
6 share constitutes market power, and that a 20%-25% market share or less does not constitute
7 market power.”) (collecting numerous cases); *Tanaka*, 252 F.3d at 1063 ; *Big Bear Lodging*
8 Ass ’n, 182 F.3d at 1105.

9 **IV. CONCLUSION**

10 The complaint is dismissed. Because the applicability of the statute of limitations
11 is not a technical defect that can be “cured” by amendment, the dismissal is without leave to
12 amend. This dismissal is on the merits as to all causes of action.

13 SO ORDERED.

14 Dated: _____

15 Hon. Martin J. Jenkins

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